

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TERESITA MAPOY,)	Case No. 11-1451 SC
)	
Plaintiffs,)	ORDER RE: FDIC'S MOTION TO
)	DISMISS AND MOTION TO
v.)	<u>STRIKE</u>
)	
WASHINGTON MUTUAL BANK, FA;)	
JPMORGAN CHASE BANK, N.A.; FEDERAL)	
DEPOSIT INSURANCE COMPANY;)	
CALIFORNIA RECONVEYANCE COMPANY;)	
and DOES 1 through 50, inclusive,)	
)	
Defendants.)	
)	
)	
)	

I. INTRODUCTION

Plaintiff Teresita Mapoy ("Plaintiff") commenced this action in California Superior Court for Contra Costa County on August 10, 2010, bringing numerous claims against Defendants Washington Mutual Bank ("WaMu"), JP Morgan Chase Bank, N.A. ("JP Morgan"), California Reconveyance Company ("CRC"), and fifty Doe Defendants. On November 15, 2010, Plaintiff filed a First Amended Complaint, which added the Federal Deposit Insurance Company ("FDIC") as a defendant. See ECF No. 1 ("Notice of Removal") Ex. B ("FAC"). The FDIC removed the action to federal court under 12 U.S.C. § 1819(b)(2)(B), which permits the FDIC to remove any state court action within ninety days of the FDIC being named as a party. See

1 Notice of Removal.

2 Now before the Court are a Motion to Dismiss and a Motion to
3 Strike filed by the FDIC. ECF Nos. 7 ("MTD"), 8 ("MTS"). Both
4 motions are fully briefed. ECF Nos. 18 ("MTD Opp'n"), 19 ("MTS
5 Opp'n"), 23 ("MTD Reply"), 24 ("MTS Reply"). For the following
6 reasons, the Court GRANTS the FDIC's MTD and accordingly denies the
7 FDIC's MTS as moot.

8
9 **II. BACKGROUND**

10 As it must on a Federal Rule of Civil Procedure 12(b)(6)
11 motion, the Court assumes the truth of the well-pleaded facts in
12 Plaintiff's FAC. Around June 27, 2006, Plaintiff obtained an
13 adjustable rate loan in the amount of \$1,700,000 from WaMu to
14 purchase the residential property located at 5440 Blackhawk Drive
15 in Danville, California. FAC ¶¶ 1, 2, 14. The loan was secured by
16 a deed of trust on the property naming CRC as trustee. Id. ¶¶ 2,
17 6.

18 Plaintiff alleges that WaMu committed numerous wrongful acts
19 in connection with the origination of her loan. Plaintiff alleges
20 that a WaMu employee, Armando LaRosa ("LaRosa"), completed the loan
21 application on her behalf, without her knowledge or consent, and
22 entered false information on the application in order to obtain
23 approval for the loan. Id. ¶¶ 18, 19. LaRosa allegedly misstated
24 Plaintiff's occupation and drastically overstated the amount of her
25 income and cash savings. Id. ¶ 18. LaRosa indicated on the loan
26 application that he had telephonically interviewed Plaintiff to
27 gather the information used to complete the application. Id. ¶
28 16. Plaintiff does not remember ever signing, or even seeing, the

1 application. Id. ¶ 17. Plaintiff further alleges that WaMu
2 misrepresented the terms of her loan by indicating that the loan
3 carried a fixed 1.25 percent interest rate, when in fact the
4 interest rate was subject to monthly adjustment to as high as
5 10.238 percent, and by representing that there was no penalty for
6 prepayment, when in fact there was a severe penalty. Id. ¶¶ 25,
7 29. Plaintiff also alleges that the loan contained other hidden
8 fees. Id. ¶ 24.

9 Plaintiff's initial monthly payment was \$5,665.28. Id. ¶ 23.
10 On August 1, 2007, her monthly payment increased to over \$7,500.
11 Id. ¶ 31. She struggled to make this higher payment and requested
12 a loan modification from WaMu in late 2007, which was denied. Id.
13 ¶ 32.

14 On September 25, 2008, the Office of Thrift Supervision
15 ("OTS") closed WaMu and appointed the FDIC as its receiver. Id. ¶
16 34. Also on September 25, 2008, the FDIC executed a purchase and
17 assumption agreement with JP Morgan that transferred certain of
18 WaMu's assets to JP Morgan. Id. ¶ 35. In early 2009, Plaintiff
19 received a letter from JP Morgan stating that JP Morgan had assumed
20 the beneficial interest under the deed of trust and Plaintiff
21 should remit her loan payments to JP Morgan henceforth. Id. ¶ 37.
22 Plaintiff has since sought a loan modification from JP Morgan to no
23 avail. Id. ¶ 39. She has continued making payments on the loan
24 but was at least two months in arrears at the time she filed the
25 FAC. Id.

26 Plaintiff asserts twelve state law claims in her FAC. Against
27 all defendants, she asserts claims for unconscionability, quiet
28 title, and declaratory relief. In addition, she asserts breach of

1 the covenant of good faith and fair dealing against WaMu, its
 2 successors in interest, and JP Morgan. She asserts the remaining
 3 eight claims against only WaMu and its successors in interest, as
 4 follows: fraudulent concealment; intentional misrepresentation;
 5 negligent misrepresentation; negligence; breach of fiduciary duty;
 6 violation of California Business and Professions Code section
 7 17200; unjust enrichment; and rescission/cancellation of void
 8 instrument. See FAC.

9 The FDIC brings its MTD under Federal Rules of Civil Procedure
 10 12(b)(1) and 12(b)(6). It argues that this Court lacks subject
 11 matter jurisdiction to hear the claims brought against it because
 12 Plaintiffs have failed to exhaust the administrative remedies
 13 available. MTD at 2. In the alternative, it argues that
 14 Plaintiff's FAC fails to state a claim upon which relief can be
 15 granted. Id. at 3.

17 **III. LEGAL STANDARD**

18 **A. Rule 12(b)(1)**

19 When a defendant submits a motion to dismiss under Federal
 20 Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of
 21 establishing the propriety of the court's jurisdiction. See
 22 Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377
 23 (1994). As a court of limited jurisdiction, "[a] federal court is
 24 presumed to lack jurisdiction in a particular case unless the
 25 contrary affirmatively appears." Stock West, Inc. v. Confederated
 26 Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). A Rule 12(b)(1)
 27 jurisdictional attack may be facial or factual. White v. Lee, 227
 28 F.3d 1214, 1242 (9th Cir. 2000) (citation omitted). In a facial

1 attack, the defendant challenges the basis of jurisdiction as
2 alleged in the complaint. Safe Air for Everyone v. Meyer, 373 F.3d
3 1035, 1039 (9th Cir. 2004). In such a case, the court assumes the
4 truth of the factual allegations, and draws all reasonable
5 inferences in the plaintiff's favor. Wolfe v. Strankman, 392 F.3d
6 358, 362 (9th Cir. 2004).

7 **B. Rule 12(b)(6)**

8 A motion to dismiss under Federal Rule of Civil Procedure
9 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
10 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based
11 on the lack of a cognizable legal theory or the absence of
12 sufficient facts alleged under a cognizable legal theory.
13 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
14 1990). "When there are well-pleaded factual allegations, a court
15 should assume their veracity and then determine whether they
16 plausibly give rise to an entitlement to relief." Ashcroft v.
17 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a
18 court must accept as true all of the allegations contained in a
19 complaint is inapplicable to legal conclusions. Threadbare
20 recitals of the elements of a cause of action, supported by mere
21 conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1950
22 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The
23 allegations made in a complaint must be both "sufficiently detailed
24 to give fair notice to the opposing part of the nature of the claim
25 so that the party may effectively defend against it" and
26 sufficiently plausible such that "it is not unfair to require the
27 opposing party to be subjected to the expense of discovery." Starr
28 v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011).

1 **IV. DISCUSSION**

2 **A. The FDIC's MTD**

3 The FDIC moves to dismiss the Plaintiff's action under Rule
4 12(b)(1), arguing that because Plaintiff does not claim to have
5 exhausted FDIC administrative remedies, this Court lacks subject
6 matter jurisdiction. MTD at 6-8.

7 Under the Financial Institutions Reform, Recovery, and
8 Enforcement Act ("FIRREA"), the FDIC, in its role as receiver for
9 failed financial institutions, may implement a mandatory
10 administrative claims review process. 12 U.S.C. §§ 1821(d)(3).
11 FIRREA limits the jurisdiction of courts over certain claims
12 asserted outside the context of the administrative process. 12
13 U.S.C. § 1821(d)(13)(D). Specifically, it provides:

14 [N]o court shall have jurisdiction over

15 (i) any claim or action for payment from, or
16 any action seeking a determination of rights
17 with respect to, the assets of any depository
18 institution for which [the FDIC] has been
appointed receiver, including assets which [the
FDIC] may have acquired from itself as
receiver; or

19 (ii) any claim relating to any act or omission
20 of such institution or [the FDIC] as receiver.

21 Id. The Ninth Circuit has held that FIRREA's exhaustion
22 requirement applies to claims made by both creditors and debtors.
23 McCarthy v. Fed. Deposit Ins. Corp., 348 F.3d 1075, 1077 (9th Cir.
24 2003). Courts lack jurisdiction to hear such claims against the
25 FDIC before the plaintiff has exhausted his or her administrative
26 remedies as required under FIRREA. In re Parker North American
27 Corp., 24 F.3d 1145, 1150 (9th Cir. 1994) ("[FIRREA] strips all
28 courts of jurisdiction over claims outside the administrative

1 procedures . . . Claimants must exhaust these administrative
2 remedies before seeking district or bankruptcy court review.").

3 The FDIC argues that because Plaintiff has not even alleged
4 that she has complied with FIRREA by filing an administrative claim
5 with the FDIC, she has failed to allege facts supporting this
6 Court's jurisdiction. MTD at 8.

7 Relying on Sharpe v. FDIC, 126 F.3d 1147, 1152 (9th Cir.
8 1997), Plaintiff argues that her claims for equitable relief lie
9 outside the scope of FIRREA and are not subject to the statute's
10 exhaustion requirement. Opp'n at 5-6. In the alternative,
11 Plaintiff requests that the Court hold an evidentiary hearing to
12 determine whether jurisdiction is proper. Id. at 15.

13 The Court agrees with the FDIC. Sharpe does not exempt
14 Plaintiff from FIRREA's exhaustion requirements. In Sharpe, the
15 Ninth Circuit created a narrow exception to FIRREA's exhaustion
16 requirement that does not apply to the facts of this case.
17 Specifically, the court held that the plaintiff, who was neither a
18 debtor nor a creditor of the FDIC, was not required to exhaust
19 administrative remedies before bringing a breach of contract claim
20 against the FDIC in federal court. 126 F.3d at 1156. The court
21 reasoned that making such claims subject to the exhaustion
22 requirement would produce a perverse result by which the FDIC
23 "would be free to breach any pre-receivership contract, keep the
24 benefit of the bargain, and then escape the consequences by hiding
25 behind the FIRREA claims process." Id. at 1156, 1157. The Ninth
26 Circuit subsequently explained that Sharpe was an "unusual" case
27 and clarified that "apart from claims made in connection with
28 bankruptcy proceedings or arising out of a breach of contract fully

1 performed by the aggrieved party but not repudiated by the
2 receiver, all claims or actions [against the FDIC] must be
3 submitted for administrative resolution." McCarthy, 348 F.3d at
4 1081.

5 Here, Plaintiff is a debtor of the FDIC as receiver of her
6 mortgage with WaMu. McCarthy expressly stated that FIRREA's
7 exhaustion requirements apply to claims by debtors against the
8 FDIC. 348 F.3d at 1076. Moreover, numerous district courts have
9 applied FIRREA's exhaustion requirement to bar mortgage-related
10 claims nearly identical to Plaintiff's. E.g., Waltner v. Fed.
11 Deposit Ins. Corp., No 10-662RAJ, 2011 WL 1675287, at *2 (W.D.
12 Wash. May 3, 2011) (applying FIRREA's administrative exhaustion
13 requirement to plaintiff's claims arising from foreclosure); Benson
14 v. JPMorgan Chase Bank, N.A., No. C-09-5272, 2011 WL 4010116, at *3
15 (N.D. Cal. Oct. 13, 2010) (same); Citrus El Dorado LLC v. Stearns
16 Bank, No. 09-1462, 2011 WL 86960, at *1-2 (C.D. Cal. Jan. 5, 2011)
17 (same). The Court therefore finds that Plaintiff's claims against
18 the FDIC are subject to FIRREA's exhaustion provisions.

19 The Court also denies Plaintiff's request for an evidentiary
20 hearing to determine whether jurisdiction is proper. The FDIC's
21 Rule 12(b)(1) motion is a facial rather than a factual attack on
22 Plaintiff's FAC. See White, 227 F.3d at 1242 (discussing facial
23 versus factual challenge under Rule 12(b)(1)). The FDIC asserts
24 that the allegations contained in the FAC are insufficient on their
25 face to invoke federal jurisdiction because Plaintiff has not even
26 alleged that she has exhausted the FDIC administrative claims
27 process. Reply at 14. By contrast, in a factual attack, the
28 challenger disputes the truth of the allegations that, by

1 themselves, would otherwise invoke federal jurisdiction. See Safe
2 Air for Everyone, 373 F.3d at 1039. While an evidentiary hearing
3 may be proper to resolve a factual attack, it is unwarranted where,
4 as here, the allegations in the FAC would not support jurisdiction
5 even if supported by evidence. Moreover, Plaintiff's request for
6 such a hearing is perplexing given that she does not purport to
7 have evidence of having exhausted the FDIC's administrative claims
8 procedure. If she does have such evidence, she must amend her FAC
9 to include the appropriate allegations. Then, if the FDIC brings a
10 factual challenge under Rule 12(b)(1), an evidentiary hearing may
11 be warranted.

12 Because Plaintiff has failed to plead exhaustion of
13 administrative remedies, this Court DISMISSES Plaintiff's claims
14 against the FDIC for lack of subject matter jurisdiction. It
15 dismisses the claims WITHOUT PREJUDICE because it is possible,
16 albeit unlikely, that Plaintiff actually exhausted the FDIC's
17 administrative remedies and merely failed to so plead. Plaintiff
18 therefore is granted thirty (30) days to file an amended complaint
19 in which she makes such a pleading. If Plaintiff does not amend
20 her complaint to allege exhaustion of administrative remedies
21 within the next thirty days, the Court will dismiss all claims
22 against the FDIC WITH PREJUDICE.¹

23 Lastly, this action was removed based on 12 U.S.C. §
24 1819(b)(2)(B) -- a removal statute that can only be exercised by
25 the FDIC. As the FDIC has now been dismissed, and all of the
26 claims in the lawsuit are state law claims, the Court will decline
27

28 ¹ Because the Court grants the FDIC's Motion to Dismiss, it DENIES
the FDIC's Motion to Strike portions of the FAC as moot.

1 supplemental jurisdiction and will sua sponte remand the case to
2 state court if Plaintiff has not amended her FAC to provide a basis
3 for federal jurisdiction within the timeline provided above.

4
5 **V. CONCLUSION**

6 For the foregoing reasons, the Court GRANTS the Motion to
7 Dismiss filed by Defendant Federal Deposit Insurance Corporation
8 and DENIES its Motion to Strike as moot.

9 If Plaintiff Teresita Mapoy fails to file within thirty (30)
10 days of this Order an amended complaint in which she pleads
11 exhaustion of FDIC's administrative remedies, the Court will
12 dismiss claims against the FDIC WITH PREJUDICE and REMAND the
13 remaining causes of action brought against defendants JP Morgan
14 Chase Bank, N.A., and California Reconveyance Company to California
15 Superior Court for Contra Costa County.

16
17 IT IS SO ORDERED.

18
19 Dated: June 29, 2011

20 
UNITED STATES DISTRICT JUDGE